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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

v.

PASCUAL GUANA-SANCHEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether a motorist has Fourth Amendment standing to object to evidence resulting from the unjustified restraint and detention of him and his automobile pursuant to a routine but warrantless police general

exploratory investigation of all occupants in quest of satisfactory proof of their identity.

STATEMENT OF THE CASE

The petitioner's statement of facts suffers from material inaccuracies and omissions obligating respondent to provide a more impartial statement.

Nature of the Case and Its Disposition

On February 1, 1972, a one-count indictment was filed against respondent charging him with transportation within the United States of three illegally-entered aliens by means of a motor vehicle, knowing those aliens to be unlawfully within the United States and knowing or having reasonable grounds to believe that the aliens had made an entry into the United States within the prior three years, all in alleged violation of 8 U.S.C. §1324(a)(2). (A.[1] 1, 2). Respondent pleaded not guilty. Included in his pre-trial motions was a Motion to Suppress and Dismiss alleging that Villa Park, Illinois, police illegally seized and detained respondent and his automobile in order to check out his driver's license and to interrogate his three passengers and obtain identification papers from them. The District Court held an evidentiary hearing, ordered the submission of briefs, and on June 8, 1972, granted the

[1] "A" designates the Appendix filed herein.

motion to suppress evidence[2] reading its memorandum opinion and order into the record. The government appealed under 18 U.S.C. §3731 and on July 18, 1973, the Court of Appeals affirmed, one judge dissenting. The government petitioned for rehearing and following its denial, petitioned for certiorari. The petition for a writ of certiorari was granted on June 17, 1974.

Statement of the Facts

1. *The Evidentiary Hearing.* At the outset of the evidentiary hearing the parties stipulated that the Villa Park police had acted without any warrant for arrest or for search and the government accordingly assumed the burden to proceed with putting on its witnesses (A. 3). The only witness called by the government was Officer Patrick Vincent Tenuto of the Villa Park police force (A. 3-67). At the conclusion of Tenuto's testimony the government asserted that the testimony of his partner, Officer Norman Hall, would be substantially similar to the testimony already received and the parties rested (A. 68) (Pet. App. 3a, n. 1). Officer Tenuto's testimony revealed the following:

Villa Park is a suburb about 17 miles straight west of Chicago, situated between the suburbs of Lombard, on

[2] The District Court denied the portion of respondent's motion seeking dismissal of the indictment on asserted grounds that the evidence presented to the Grand Jury was obtained in violation of his constitutional rights. In view of this Court's subsequent decision in *United States v. Calandra*, 414 U.S. 338 (1974), the District Court's ruling was correct.

the west, Elmhurst, on the east, and Addison on the north (A. 4, 18). The population consists of 25,000 to 30,000 persons, 95 to 98 per cent white but with some "orientals" and "Mexicans" (A. 4-6). The town is basically half residential, half industrial, with small businesses and factories (A. 4). The 30 to 35 member police force is all white (A. 14, 55).

In Villa Park the police department has devised a standard operating procedure directed at all persons encountered in automobiles in the nighttime (A. 26-28). Officer Tenuto's testimony revealed that whenever the Villa Park police have occasion to stop or check out a car for any reason at all (A. 27-28) they customarily ask both the driver and the passengers to produce identification, and if the subjects are unable to produce identification, the authorities "take them into the police station to see who they are" (A. 26), that is, " 'to make sure they are not wanted for anything, they are not criminals' or just a general check to see who they are" (A. 26).[3] The District Court found that "Villa Park authorities apparently regard as naturally suspect and detain persons found in that city at night, unless they provide identification that the police find satisfactory" (Pet. App.[4] 25a).

[3]Somewhat similarly, but not in issue here, when drivers in Villa Park fail – apparently either at day or night – to produce their driver's licenses, the police "usually" hold them on the spot or bring them to the station and hold them until the police find out if they have a valid driver's license from some state (A. 59). See *Gustafson v. Florida*, 414 U.S. 260 (1973). If they are taken to the station house, they and their cars are searched (A. 59-60).

[4]"Pet. App." designates the appendix to the Petition for Writ of Certiorari.

In this setting, on November 17, 1971, Officer Tenuto and his partner Hall were on routine traffic and patrol duty in a marked patrol car (A. 6-7). At approximately 2:30 a.m. they were running radar at the intersection of North Avenue and Addison Road in Villa Park and had stopped a car going over the speed limit. During this traffic stop Tenuto noticed respondent's station wagon parked 150-200 feet across the intersection – "kitty corner" from him – in a curbed but unpaved cutoff between the two intersecting roads (A. 8-9). Defendant's Exhibit A (Admitted, A. 67) depicts this area as a natural place to pull an automobile out of the line of traffic.[5] The officers could see that the headlights and interior dome light of the station wagon were turned on and observed three or four occupants, one of whom was looking at what appeared to be a map (A. 9). Believing that the driver was lost, the officers drove their squad car across the intersection and pulled up behind respondent's vehicle. They radioed the police dispatcher at about 2:33 a.m. (A. 76, line 2[6]) that they were busy "checking out"[7]

[5]Although the government refers to the vacant lot, it omits mentioning the cutoff through the lot at the time of the occurrence (Brief for Pet. 4). (See Defendant's Exhibit A; A. 65-67).

[6]The petitioner misreads this entry [*i.e.*, the entry in the radio log, Government Exhibit 1 (admitted A.14) requesting the license plate check] as appearing on line *3* of the second page thereof (Brief for Pet. 4) (See A. 13-15, 76, line *2*). Perhaps this contributes to the government's confusion as to when the officers received the results of the check (Brief for Pet. 4 & n.4). *See* note 9 *infra*.

[7]The District Court concluded that the officers "were going to the 'aid of a motorist in distress' " (Pet. App. 17a, 21a). (See Brief of *Amici Curiae* 16).

respondent's car, routinely requested a license number check on it (A. 10-11, 14-16), and approached respondent's car on foot (A. 9-16).

Officer Hall proceeded to the driver's side and Officer Tenuto stationed himself on the passenger's side (A. 16). Both officers were in police uniform with badge, and each had a pistol, handcuffs, extra ammunition and a container of chemical Mace strapped to his belt, plainly displayed (A. 56-57). The respondent was behind the wheel, one passenger was seated in the front seat and two in the rear – one asleep (A. 17). The station wagon, which needed an exterior wash, also contained approximately three shopping bags holding clothing or material (A. 17, 29).

Respondent had a map of the Chicagoland area in his hand and was trying to locate a restaurant (A. 17) when Officer Hall moved in and asked him if there was any trouble (A. 16; Pet. App. 17a). Respondent explained that he was looking for a restaurant, owned by a friend, in a neighboring town; and, that if it were not open, he wanted to find a "Beef & Barrel" restaurant (A. 17). He showed Officer Hall a matchbook advertising a "Beef and Barrel" in the neighboring town of Lombard (A. 19). Hall told him which direction the Beef and Barrel was and Officer Tenuto went back to the squad car and radioed *some* of the other towns, hunting for respondent's friend's restaurant. Tenuto was told there were no restaurants open in those towns past one a.m. (A. 20).[8]

[8]The government overstates the case in its claim that "officer Tenuto established that no restaurants in the vicinity were open beyond 1:00 a.m." (Brief for Pet. 4). Tenuto only testified that he "radioed *some* of the other towns if they knew of an all night restaurant that was open in *their* town which might have been

Officer Tenuto then returned to his position on the passenger's side and heard Officer Hall request respondent to produce some type of identification (A. 20). Respondent complied by giving Officer Hall a "valid Illinois driver's license" (A. 20-21). Respondent's name and address on the driver's license corresponded with the car registration information previously obtained by the officers as a result of the license plate check made by the dispatcher (A. 58; Pet. App. 17a, 19a).[9] The check also revealed that respondent's car

the owner [*sic*] his friend, . . ." (A. 20) (emphasis added). It is therefore plain that *some* of the other towns "in the vicinity" were *not* radioed. Further, since Tenuto spoke in the context "We told him which way the Beef & Barrel was. . . . I radioed some of the *other* towns . . ." (A. 20) (emphasis added) he may not even have radioed Lombard, the town where the Beef & Barrel was (A. 19). *See also* note 15 *infra*.

[9]For the first time in this entire litigation the government, in its brief on the merits, suggests that there is an issue of fact as to when the results of the license plate check were received by Tenuto (Brief for Pet. 7 & n. 4) (Compare Pet. 4). It now accuses the District Court of "misreading the radio log" (Brief for Pet. 8, n. 4). But Officer Tenuto testified that at about 2:32 or 2:33 a.m. he and Hall pulled up behind respondent's car and radioed in the license number for a check (A. 10-11) and "for sure" (A. 57) that they "got an answer back approximately three to five minutes later" (A. 58). He specifically examined the Villa Park radio log and interpreted it as showing [on A. 76, line 2] that at 2:33 a.m. he and his partner were logged as being busy checking out respondent's car (A. 14-15) and the next entry – at 2:35 a.m. – as recording [on A. 76, line 3] the results of the check (license number, owner's name and address learned, and type of car) (A. 62) "*received from*" the dispatcher (A. 58) (emphasis added). The government claims that line 3 of the radio log "reveals that the *dispatcher* received the answer at 2:35" (Brief for Pet. 8 n. 4) (emphasis added) but the actual entry (A.

was not stolen or wanted in connection with any crime (A. 58). The driver's license was then returned (A. 23).

At the time of its return there was no testimony of furtive movements or any suspicious behavior whatsoever on the part of respondent or any of his passengers (see A. 19). And the District Court found "at this point there were no grounds stated to infer that a crime was being committed, had been committed or was about to be committed" (Pet. App. 17a). Yet, respondent and his passengers were still detained and not free to leave (A.64).

76, line 3) bears no abbreviation indicating whether it records a "Station to Station" or a "Base to Car" transmission (see A. 75). And Officer Tenuto's testimony is more consistent with the latter (A. 58). Even if the 2:35 a.m. entry is the former, though, there is nothing to refute that it was immediately transmitted on to the officers in the field as a part of the same transaction. Tenuto was then at the radio hunting for an open restaurant (A. 20) (and the squad car might well also have been equipped with an outside loud speaker). Thus, the government's claim of a delayed relay is, at best, built on its own favorable construction of ambiguities in the log, oblivious to Tenuto's interpretation. However, even assuming ambiguity, one would logically expect the officers to hold the driver's license until they had received and compared the license plate check information.

In view of all this we do not understand how the District Court's previously unchallenged factfinding that the "radio report had been requested by the officers at 2:33 a.m. and was received by them at 2:35 a.m." (Pet. App. 17a) can be mistaken, let alone considered "clearly erroneous", as it must be it it is to be disregarded. *E.g.*, *United States v. Luckett*, 484 F.2d 89, 90 n. 1 (9th Cir. 1973) (per curiam). With due respect, the government's real claim is that the Solicitor General's office can somehow read the Villa Park radio log better than Villa Park Police Officer Tenuto, as well as better than the District Court and everyone else considering the issue. *See* note 6 *supra*.

Despite respondent's satisfactory driver's license and license plates, Officer Hall continued the questioning and asked the three passengers to produce "some type of identification" (A. 23) pursuant to standard operating procedure of the Villa Park police force in the nighttime (A. 26-28). The passengers appeared not to understand the officer's request, and it was repeated with the same success. Then Officer Hall instructed respondent to address his passengers in Spanish and ask them for identification (A. 23). He complied, awakening the sleeping passenger in the process. Two shook their heads "No" to indicate no ID's; the front seat passenger handed over a card to Officer Hall (A. 24). Officer Tenuto looked at it, saw the Spanish words "Army", "military", and "Mexico", and concluded it was a "Mexican Army I.D. card" (A. 24-25). Hall had respondent ask the other passengers several times more for identification but the response remained the same. Next the officers radioed for Sergeant Weiser, on duty in a separate car as their supervisor and back-up unit, who arrived shortly (A. 7, 25). Sergeant Weiser said "Let's bring them into the station and check them out and see who they are, if they are wanted by anybody" (A. 59; Pet. App. 3a). The police then told respondent to have the two men in the back get out of the car (A. 25, 59). After being "ordered out" of respondent's car (A. 59), the pair were placed in Weiser's squad car (A. 28; A. 76, line 5). As for respondent and the front seat passenger, the police "had" them follow the other

police car which "escorted" them to the police station (A. 59, 62, 76, line 6) (See Pet. App. 3a-4a, 19a).[10]

At 2:46 a.m.–about 15 minutes after the encounter began–the three cars arrived at the police station (A. 7, 10, 29, 63, 76, line 7). Respondent and the three passengers were brought inside (A.29). The sergeant had Sanchez continue as a translator and ask the three to print their names and ages (A. 26, 30). Meanwhile, other officers were searching respondent's car without his permission (A. 63). The sergeant then phoned the night officer of the Immigration and Naturalization

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[10]The government's statement of facts throughout reflects the least mandatory police language possible – always choosing, for example, "asked" or "requested" rather than "ordered" – in describing the encounter, although it does not directly assert that no compulsion was present (See Brief for Pet. 6). In answer to this advocacy it is sufficient to point out that, *first*, the record abounds with evidence of compulsion (A. 26-28, 29, 30, 34-38, 40-42, 56-57, 59, 63, 64, 65-66) even though one could not expect the police to actually confess such, *second*, the District Court specifically found respondent, at the intersection, "was taken into custody by the Villa Park police officers 'for investigation'" (Pet. App. 19a, 20a-21a), *third*, the Court of Appeals agreed (Pet. App. 3a), *fourth*, the petition for certiorari states explicity "The government did not challenge in the court of appeals – and does not challenge here – the district court's conclusion that, when the police took respondent and his passengers to the police station, they made an unlawful arrest" (Pet. 5), and finally, *fifth*, the brief on the merits likewise concedes that respondent did not voluntarily interrupt his travel to make the trip to police headquarters (Brief for Pet. 10 n. 6). *See Davis v. Mississippi*, 394 U.S. 721, 726 (1969). *See also* note 27 *infra*.

Service, who could speak Spanish, and had respondent direct each of the three passengers to speak with the agent (A, 31-32, 26). At the conclusion of the telephone interrogation, the sergeant, acting on the Immigration agent's request, ordered the four locked up until Immigration could come in the morning to investigate. (A. 32-33).

Officer Tenuto also testified to three other experiences with illegal aliens during his four to five years service as a police officer. In each he had assisted others in raiding a dwelling thought to house illegal Mexican aliens. Tenuto believed some of them had no United States identification; some had entered the country illegally by bus or truck, some by car; and, some had come to the Villa Park area because of small factories looking for cheap labor (A. 33, 39-40, 44-46). It had already been established that he did not understand Spanish (A. 32) or apparently even recognize it (A. 23-24). On cross-examination it developed that he could not tell Mexicans from Puerto Ricans and did not know Puerto Ricans were American citizens by birth (A. 55).

2. *The District Court Opinion.* On June 8, 1972, the District Court ruled holding that at least by the time the officers returned respondent's driver's license to him the police had no grounds to suspect a crime and the further detention violated his Fourth Amendment rights (Pet. App. 17a). The Court stated:

> "Whatever proper investigative suspicions they *may* have had earlier were dispelled at this point, and thus it was unjustified to hold the vehicle longer, or its occupants, or to interrogate the passengers." (Pet. App. 19a) (emphasis added)

The Court also specifically condemned the Villa Park police procedure of demanding proof of identity from persons stopped or encountered in cars at night (Pet. App. 20a-21a, 25a). Since the government did not show "that the testimony of the passengers found in Sanchez' automobile could have been obtained independently of the events that transpired in Villa Park on November 17, 1971" and since the Court found "no attenuating circumstances whatsoever" observing that "[t]he witnesses whose testimonys are sought to be suppressed were discovered not merely as a result of illegal police conduct but in the course of that illegal conduct", the identification and proposed testimony of the passengers was ordered suppressed (Pet. App. 24a-25a).[11] The District Court also found that the police conduct violated Illinois law and that Illinois police officers have no authorization to make arrests without a warrant for

[11] In view of the District Court's holding—amply justified by the government's failure to offer any evidence on the subject—that the government had not met its burden of showing attenuation or an independent source (Pet. App. 24a), we deem it inaccurate and hardly fair for the government now to assert the Court "unqualifiedly" granted respondent's motion to suppress (Pet. 5; Brief for Pet. 9). Similarly, in view of the District Court's holding and in further view of the government's concessions (A. 77, 78) relied upon by the Court of Appeals (Pet. App. 5a n.4), it is also hardly accurate and fair for the government now to assert that the Court of Appeals *required* "unqualified" suppression by affirming the District Court decision (Pet. 6, 7; Brief for Pet. 11). The government failed in the trial court to make any arguments or offer any evidence upon which qualifications could be drawn. Therefore, its present characterization and Judge Pell's alarm in dissent over the District Court's swift disposition of the taint question (Pet. App. 11a) are unjustified in respondent's view.

violations of federal immigration laws (Pet. App. 20a-23a).

3. *The Court of Appeals.* In the Court of Appeals the government conceded that the interrogation of the passengers in respondent's car constituted a search of that car to which respondent had standing to object (A. 77). The petitioner also conceded that "the testimony of witnesses discovered during an illegal search can be suppressed as to a person having standing to object to the search" (A. 77) and that the proposed evidence against respondent "flows" from the questioning of the passengers in respondent's automobile (A. 78). Rather, the government's basic theory, now abandoned (Pet. 5; Brief for Pet. 10 n.6), was that *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972), could be extended to justify—on the basis of specific and articulable facts amounting to reasonable grounds to believe that criminal activity might be afoot—(1) continuing the investigatory stop to quiz the passengers in respondent's car and (2) transporting the passengers to the police station for further investigation there. It also argued, alternatively, that petitioner lacked standing to complain as to the latter intrusion, only.[12]

The Seventh Circuit affirmed, one judge dissenting, on July 18, 1973. In its analysis:

> "Three steps in time can be delineated from the facts before us: (1) the original interrogation

[12] Petitioner addressed no argument as to the propriety of also taking respondent to the police station and of using him there as a translator to carry out the continued probe. It now, of course, "Assume[s] *arguendo*" that this "arrest", at least, was "unlawful" (Brief for Pet. 10 n.6).

ending with the determination of validity of Sanchez's driver's license and his ownership of the car; (2) the period beginning with the return to Sanchez of his license and of the restraint upon his movement thereafter; and, (3) the period beginning with the trip to the police station." (Pet. App. 2a)

After noting expressly that the trial court had decided there was no "reasonable suspicion" or "probable cause" to justify the police activity *after the "first step"* (Pet. App. 3a) (emphasis added), the Court of Appeals, in affirming, concluded "the district court did not err in deciding that the arrest was unreasonable under the Fourth Amendment and that the evidence gained thereafter was 'fruit of the poisonous tree' " (Pet. App. 5a).

On the other hand, in fairness, the Court of Appeals opinion can also be read as concluding that respondent was "arrested" after the *second* step, that is, beginning with the trip to the station house (Brief for Pet. 10). (The opinion nowhere uses the word "detention" or considers the concept of detention short of a full-blown "arrest").

In any event, as the petitioner now admits (Brief for Pet. 12-13), the appeals opinion did not purport to extend third-party standing to respondent.

The dissenting judge (1) found no fault with any of the police conduct (Pet. App. 6a), (2) argued that testimony of a witness discovered during an illegal police search should not be excluded as "fruit of the poisonous tree", the government's concession notwithstanding, apparently[13] advocating a *per se* rule against

[13]The dissent points to the cases supporting the attenuation or case by case analysis but evidently would itself hold the witness' testimony *per se admissible* (Pet. App. 7a, 8a) with the circumstances of the police discovery also admissible to bear on the *weight* of the testimony, if the police behavior somehow affected the witness in a way which might alter the testimony (Pet. App. 7a). Such circumstances of course are already admissible under all present law. *Cf., Davis v. Alaska*, 415 U.S. 308 (1974).

applying the exclusionary rule to witnesses as opposed to other testimony (Pet. App. 5a-12a), and (3) found that petitioner was not aggrieved in the standing sense of that term (Pet. App. 12a-13a).

SUMMARY OF ARGUMENT

A. In an accurate view of the facts, it is evident that the police in this case had encountered respondent Pascual Sanchez in his station wagon, directed him to a restaurant he was looking for, and, following checks of his license plates and driver's license, verified who he was, his own local ownership of the car, and that the car was not stolen or wanted in connection with any crime. Yet, despite the absence of any suspicion, they further detained respondent and his automobile, interfering with his constitutionally protected right of free passage on the public highways, to seek out proof of identity from his passengers pursuant to a standard operating procedure of the Villa Park police department.

Under this warrantless nighttime routine local Villa Park police officials have vested themselves—in derogation of Illinois law—with a roving commission to detail all persons in automobiles encountered there for any

reason, in order to demand proof of identity and, if the response is not satisfactory to their liking, to bring them and their companions to police headquarters to see if they might be "criminals." It has been the law, however, at least since 1968 that such "investigatory seizures" short of a full-blown "arrest", in the absence of specific articulable facts reasonably justifying the intrusion, violate the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968). Accordingly, respondent's detention pursuant to this "dragnet" routine violated his own Fourth Amendment rights. And that is the test for standing. (It was the petitioner's principal theory below that respondent indeed had standing but there was reasonable suspicion to justify the police intrusion, characterized by petitioner as a "search" or "investigatory stop." However, its attempts to justify the warrantless routine failed below and it has abandoned the effort here, at least directly).

The single purpose of this deliberate and intrusive police routine is the quest for proof of identity and as a direct consequence of respondent's illegal detention pursuant to it the evidence against him in the instant prosecution for transporting his passengers as illegally entered aliens was obtained. Since the procedure violated his own rights, he has standing to object to the resultant evidence, as the government essentially conceded below.

B. Petitioner would prefer to ignore this "investigatory detention" and divert the Court's attention to other matters. In an argument which appears to glorify semantics over sense, petitioner attempts to withdraw its concession in the Court of Appeals that the probe of respondent's car in quest of identity

documents amounted to a search to which respondent would have standing to object. Arguing antiquated property law notions, it now claims that no "search" really occurred. This switch of theories is unavailing, however, since a technical trespass is no longer required for a search to have occurred, since the identities and documents of the passengers were by no stretch of the legal imagination in "plain view", and, moreover, since the Villa Park standard operating procedure intruded upon respondent's protected interests as a motorist whether the conduct is technically labelled a "search" or not. As the owner and operator of a private passenger car using the public highways respondent was entitled to a reasonable expectation of freedom from the sort of intrusion he experienced here. Again, since the police conduct breached respondent's own rights, he has standing.

C. The necessity for deterrence is great in a case such as this, since the standard operating procedure in question poses such a widespread threat to the liberty of motorists, as well as to the freedom of legally entered aliens and other "foreign-appearing" persons. Moreover, the doctrine which the government would unleash artificially nullifying standing in group situations portends to upset settled and necessary Fourth Amendment law.

D. Although petitioner has invited some confusion on the subject, standing is the only issue before the Court in this case. On the record below there is no question presented as to when, or whether, the future testimony of witnesses discovered in the course of police illegality constitutes "fruit of the poisonous tree." Petitioner certainly does not disagree. Respondent has standing here because it has been shown that the law enforcement procedure by which the evidence

was procured transgressed his own constitutional rights. Therefore, this Court should affirm the District Court ruling unless that Court's factfinding is "clearly erroneous", something which petitioner does not and cannot fairly argue.

ARGUMENT

I.

SINCE THE POLICE VIOLATED RESPONDENT SANCHEZ'S OWN PERSONAL RIGHT OF FREE PASSAGE ON THE PUBLIC HIGHWAYS WHEN THEY UNREASONABLY DETAINED HIM AND HIS AUTOMOBILE IN ORDER TO CARRY OUT THE WARRANTLESS VILLA PARK STANDARD OPERATING PROCEDURE, HE HAS CONSTITUTIONAL STANDING TO EXCLUDE THE RESULTING EVIDENCE.

A. Respondent Was Constitutionally Entitled to Protection From Unjustified "Investigatory Seizures" at the Intersection in Villa Park and, Even Though He Was Not Formally "Arrested" until Later, the Police Violated His Fourth Amendment Rights When, After Satisfactorily Clearing his License and Without Reasonable Suspicion, They Detained Him and His Automobile to Seek Out Proof of Identity from His Passengers Pursuant to the Local Procedure.

At the very outset we should caution the Court that petitioner has strained itself to present the facts in a

light most favorable to the government, *cf. Glasser v. United States*, 315 U.S. 60, 80 (1942), and on occasion *only* the facts favorable to the government. Too, it has largely shut its eyes to the factfinding of the District Court. Whether or not the government has kept within the bound of fairness and accuracy in its efforts to recast the facts, and whether or not its new facts would be of avail, it has pursued a course not open to it. The government had the burden in the District Court to justify the warrantless Villa Park, Illinois, police procedure (A. 3), *e.g., Collidge v. New Hampshire*, 403 U.S. 443, 453-55 (1971); it came to the Court of Appeals as appellant; and, it comes here as petitioner.

In any event, the facts are peculiarly important. An analysis of what went on in Villa Park on November 17, 1971, should convince this Court that the record not only supports the District Court judgment but practically compels it. The Villa Park police standard operating procedure directly and personally injured respondent Sanchez in his own constitutional right of "free passage" on the public highways, *Carroll v. United States*, 267 U.S. 132, 154 (1925), and he therefore has standing to complain of his victimization. The question of standing is nothing more than one of whether the defendant's own individual rights were violated by the conduct which resulted in the procurement of the evidence against him. *E.g., Alderman v. United States*, 394 U.S. 165, 171-76 (1969).

To begin with, respondent and his station wagon were lawfully in Villa Park. A marked police cruiser was across the intersection where the officers were engaged with another motorist stopped for a traffic violation, but respondent made no effort to slip away from the

scene or even to turn off his own lights. When the police first saw respondent he was undisputedly looking at a map. They approached his car, saw that it was a map of the Chicagoland area and learned that he was looking for certain restaurants, an explanation certainly consistent with having a local map out. When the officers observed inside respondent's station wagon, they could see it nowhere contained burglary tools or loot or other evidence of crime.[14] And, as Officer Tenuto testified, "The passenger behind Mr. Sanchez was asleep the other two were just sitting there" (A. 17). There of course was no testimony here that the officers believed the four were "casing a job". Compare *Terry v. Ohio*, 392 U.S. 1, 6, 22-23 (1968). Nor was there any informant's tip of any kind in this case, let alone a tip subsequently confirmed by the discovery of a gun "in precisely the place indicated by the informant". Compare *Adams v. Williams*, 407 U.S. 143, 145 (1972). In short, the circumstances here were innocent.

Nothing then ensued which aroused the officers' suspicions. The transaction concerning the restaurants was entirely commonplace and neither the District Court or the Court of Appeals found otherwise.[15] And

[14]To evaluate the "clothing or material" in the shopping bag (A. 17) into something more criminal would, we suggest, require a mighty after-the-fact leap in inference from a most impalpable foundation. *See Henry v. United States*, 361 U.S. 98, 103-04 (1959).

[15]When Circuit Judge Pell, the dissenting judge in the appellate court, concluded "defendant's story of looking for a friend's restaurant *did not check out* as all restaurants in the area had been closed for several hours" (Pet. App. 6a) (emphasis added) he was endorsing a government argument which the trial

quite to the contrary, after the license check was accomplished, "[w]hatever proper investigative sus-

court had not accepted. From the cold record alone, however, this contention appears ill-founded.

One. To start with, Officer Tenuto himself never testified that his radioing was intended as a "check" or that he drew the inference either that respondent told a "story"–i.e., that a lie was told–or that his story did not "check out"–i.e., that a lie was caught. Notably the police did not even ask respondent for his friend's name (A. 20). The officer testified to no suspicion concerning respondent's statements. *Two*. Moreover, as a matter of fact, contrary to Judge Pell's belief and petitioner's representations here, Tenuto did not radio "all" of the other towns about their restaurants and probably did not even radio Lombard, where the Beef & Barrel was, at all. *See* note 8 *supra*. Indeed, since the officers gave respondent directions to the Beef & Barrel restaurant (A. 20) they must have known that it at least was then open. Hence, using petitioner's own logic, respondent's story about looking for a Beef & Barrel in Lombard *did* "check out". *Three*. Assuming even that all the restaurants in the area had been checked on and were revealed to have been all closed since one a.m.–or that the restaurant respondent was hunting was affirmatively learned to be closed as the District Court entirely uncritically (but erroneously) assumed (Pet. App. 17a)–, there is nonetheless a logical flaw in the government's contention. Respondent only asserted to the officers as fact that he was looking for certain restaurants, not that he knew for sure they were open. Thus, the fact that they were not open would not contradict the statement respondent was looking for them. *Four*. Furthermore, it is not uncommon for persons late at night to look for restaurants which turn out to be closed. The average person assuredly does not catalogue and keep current the closing hours of all restaurants he may ever consider patronizing. *Five*. In conclusion, the police conduct here under review was plainly predicated on the Villa Park standard operating procedure and not any individualized suspicion about the respondent and his companions.

picions they *may have had earlier were dispelled . . .*", as the District Court expressly found (Pet. App. 19a) (emphasis added). The officers had ascertained from headquarters the car was not stolen or wanted in connection with any crime, determined the ownership information obtained in the license plate check corresponded to that on Sanchez's valid driver's license[16] and consequently also knew that the car was locally owned and was being operated by its owner. This is by no means the usual case found in the courts where suspicions have instead escalated. Compare *Terry v. Ohio*, 392 U.S. 1, 28, 30 (1968) and *Adams v. Williams*, 407 U.S. 143, 148 (1972). At this juncture in the encounter there simply was no legitimate basis to prolong the episode any further or spread the interrogation to the passengers (Pet. App. 19a). That is, as the District Court found, " . . . at this point there were no grounds stated to infer that a crime was being committed, had been committed or was about to be committed" (Pet. App. 17a) and " . . . there was not only less than probable cause to arrest Mr. Sanchez, there was not even that quantum of suspicion which would justify a stop and search under Illinois law" (Pet. App. 25a). Respondent had directions to the Beef & Barrel, he should have been free to leave.

But he of course was not free to depart. Had he attempted to drive off, as Tenuto testified, the officers

[16]The facts could hardly be clearer than that the criminal information report came back to the officers almost immediately, *i.e.*, at 2:35 a.m., and we submit there can be no *bona fide* dispute on this point. *See* note 9 *supra*.

"would get back in the squad car and take off after him and pull him off again" (A. 64) (Pet. App. 2a, 19a).[17] That is the rub.

In 1968 this Court held that persons using the public streets are entitled to Constitutional protection in encounters with the police even if the experience does not result in a formal "arrest":

> "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in the traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

The instant encounter of course did evolve into a trip to the police station and finally a formal arrest. But nevertheless respondent was protected by the Fourth Amendment as he sat in his station wagon back at the intersection of North and Addison. We emphasize this because we perceive that attempted technical or semantic distinctions are being used to obscure this basic feature of the case. (See Mem. Opp. 6-8). It is probably worth repeating this Court's teaching in *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969).

[17]Petitioner has not presented any issue here as to the fact of respondent's "restraint" or "detention" by the police at this moment in time. Therefore, in addition to pointing out Tenuto's testimony and the trial and appeal courts' favorable findings on this subject (Pet. App. 19a, 2a), we only note that the police had already demonstrated a show of authority in demanding the production of respondent's driver's license and that respondent had submitted to the same. Legally, he was "in custody" at this point. *See Orozco v. Texas*, 394 U.S. 324, 327 (1969).

> "It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrustions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' We made this explicit only last Term in *Terry v. Ohio*, 392 U.S. 1, 19 (1968), when we rejected 'the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."' " (footnote omitted).

We conclude from the above that the "investigatory detention" of respondent and his motor vehicle after the driver's license had been checked and returned violated the Fourth Amendment and he has standing to exclude the evidence obtained as a result of this interference with his own personal liberty. *See Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 29 (1968); *Adams v. Williams*, 407 U.S. 143 (1972).[18]

[18]The facts herein present no question of whether a Fourth Amendment violation may have occurred earlier or whether the demand for the license of the operator of the vehicles was proper (See Brief of *Amici Curiae* 17-18).

United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) (per curiam) serves as an example of this concept. In that case the police had detained a pedestrian (initially stopped for a possible jaywalking violation) longer than necessary just to obtain identification and execute a traffic summons. Rather, after these functions were completed and he had produced five pieces of identification satisfactory to the officers, he was nevertheless held further so that the police could run a warrant check on the name he had given. The results of this routine were revelation of an outstanding traffic warrant, consequent arrest and search, and discovery of counterfeit postal money orders in defendant's pocket. The District Court suppressed these fruits; the government appealed; and the Court of Appeals affirmed holding the continued detention "unreasonable". 484 F.2d at 91.

To return to the case at hand, the "investigatory detention" of respondent and his vehicle was similarly "unreasonable". Neither he nor his passengers had given the officers any occasion for suspicion—not even a jaywalking violation—and the police were quite unable "to point to specific and articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion". *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Instead, the police pointed only to the authority of the Villa Park standard operating procedure. That is precisely the point of this case and the basis upon which the intrusion should be judged. *See, e.g., United States v. Cunningham*, 424 F.2d 942, 943 (D.C. Cir. 1970) (per curiam). *Compare* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222

(1969) *with SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). And, there is, we submit, no constitutionally acceptable justification for the warrantless area wide Villa Park police routine under review here.[19]

The record shows that in derogation of the law of their own state, these officers were vested by their local police department "with a roving commission to detain any and all persons in order to demand satisfactory proof of identity from them, and to haul them and their companions to a police station upon their failure to produce the requested identification. . ." (Pet. App. 20a-21a). They were "doing a general 10-6." ["checking out"] of the persons in the whole area (A. 28) by a routine so comprehensive that it covered persons merely changing a flat tire (A. 27). All of this without even "inarticulate hunches" of their own. *Cf., Terry v. Ohio*, 392 U.S. 1, 22 (1968).

The potential for "wholesale intrusions upon the personal security" of motorists is enormous. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy of

[19]It was apparently hoped that the Villa Park nighttime police practice of requiring identification documents of all persons encountered there in autos would reduce the incidence of burglary (A. 25, 27). But Judge Pell, dissenting below, was mistaken in his belief that there was any testimony of "recent" burglaries in Villa Park (Pet. App. 6a) (A. 25, 27). Nor was there any testimony whatsoever detailing the extent and nature of crime in Villa Park or other such factors which *might* be used to justify the police standard operating procedure–at least if first scrutinized by a neutral and detached magistrate under a warrant procedure. *Compare Almeida-Sanchez v. United States*, 413 U.S. 266, 275, 283-85 (1973) (Mr. Justice Powell, concurring) *with Davis v. Mississippi* 394 U.S. 721, 727-28 (1969).

involuntary detention." *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969). That potential is well illustrated in the instant case.

Knowing of the Villa Park police procedure one could have predicted from the instant the squad car headed towards respondent's station wagon that the encounter would "eventuate in a trip to the station house." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). It was inevitable–"SOP" (A. 27). The first step, of course, following the driver's license check, was to insist upon similar documentation of the identities of the passengers. Naturally, one step led to another, with respondent being used as translator, until they were all in the Villa Park jail.[20] Parenthetically, the Villa Park police victims' destiny is relevant since *Terry v. Ohio*, 392 U.S. 1, 20 (1968) sets up a two-pronged test, ". . .whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." The critical point, however, is that this entire unfolding drama results from the police not letting respondent leave after his driver's

[20]The *amici curiae* suggest that "[r]espondent's arrest apparently related to the officers' need for continuing translation assistance." (Brief of *Amici Curiae*, 23-24). This is a permissible inference and lacking *amici*'s expertise in the field we have no reason to doubt it. Respondent for his part simply does not know why he was brought in. The reason is not important, however. What counts is that he did not go voluntarily (*see* note 10 *supra* and accompanying text) and that the trip resulted from the police standard operating procedure (A. 26, 59) (Pet. App. 20a-21a).

license was returned and instead pursuing their plenary "dragnet" routine.

In *United States v. Jeffers*, 342 U.S. 48 (1951), a case involving the warrantless entry of a hotel room rented by defendant's two aunts followed by a detailed search of the room for drugs eventually resulting in the discovery of stampless cocaine and codeine in a pasteboard box on the top shelf of a closet, the government seemingly tried to slice up the search and seizure between the several victims in order to defeat standing, as they are attempting here. This attempt was rejected, 342 U.S. at 52, in words that we find instructive:

> "The Government argues, however, that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."

We submit that similarly "events are [not] so easily isolable" here and "[r]ather they are bound together by one sole purpose"—to extract satisfactory proof of identity from persons found at night in Villa Park.

To sum up, while we do not contend *Jeffers* is controlling, it points the way. Respondent does stand on such cases as *Davis v. Mississippi*, 394 U.S. 721

(1969) and *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam) suppressing evidence eventuating from an "investigatory detention" and identifying the defendant as a suspected criminal. *See also United States v. Ward*, 488 F.2d 132 (9th Cir. 1973) (*en banc*) *Cf., United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971). As we stated at the beginning, the question of standing is one of individual right and duty. Had respondent been permitted to drive on—as he was Constitutionally entitled—the police would have obtained no evidence against him.[21] Instead he was unlawfully detained and embroiled in a warrantless police identification procedure restricting his own personal liberty in a manner which may be common in some police states but which is prohibited in our land. The District Court did not err in determining that he had standing.

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[21]Since the evidence against respondent was plainly "discovered during" (A. 77) and "[flows from]" (A. 78) the invasion of defendant's own rights by whatever name that intrusion is labelled, the government's attempted distinction now between a "search" and an "arrest" offered in an effort to wriggle out of its concession below (Brief for Pet. 14-15) simply does not make sense. Under the facts at bar the evidence was discovered as a direct consequence of respondent's own detention. *See also* note 28 *infra*.

II.

B. The Police Procedure Intruded Upon Respondent's Protected Interests as a Motorist and the Government's Present Theories Denying the Occurence of a Technical "Search" Based on Antiquated Property Law Notions Do Not Negate the Intrusion.

Despite the foregoing, petitioner argues that the police identification procedure resulted in no violation of respondent Sanchez's own personal constitutional rights. Basically, in its apparent eagerness to manufacture an issue out of the Court of Appeals opinion, petitioner ignores the District Court rationale bottomed on respondent's own right to travel on the public highways free of unreasonable detention of his person. (Brief for Pet. 12-13, 14-15). The government instead only considers the questions of the "search" for proof of identity (Brief for Pet. 13 & n.9) and of respondent's subsequent formal "arrest" when he and his passengers were directed to police headquarters (Brief for Pet. 13-14). Although it may well be unnecessary to the disposition of this case, in the interest of analytical clarity we will take up these issues the government would concentrate on. Beforehand, though, to exclude any possibility that our discussion will introduce semantic confusion, we would quote again from *Terry v. Ohio* (392 U.S. at 19):

> "The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment–the reasonableness in all the circumstances of personal security. 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search'."

The petitioner pretends that nothing more than a "search" of respondent's car is implicated in the Villa Park procedure and then declares its concessions in the Court of Appeals (A. 77, 78) inoperative with the assertion that "[t]here was no 'search' of the car in the constitutional sense: the passengers were in plain view and the officers never entered the vehicle" (Brief for Pet. 13 n.9), adding that the police obtained no useful information anyway. On this basis the government concludes that "[t]he alleged 'search' of the car is no part of the case as it reaches this Court", and would hurry us on to discuss the issue of the subsequent "arrest" (Brief for Pet. 13).

We will not dwell further on petitioner's attempt to eclipse the "detention" issue, but do suggest that a more complete examination of the Constitutional interests implicated in the Villa Park standard operating procedure is in order.

Let us first deal with the government's hypothetical. Petitioner states that if respondent had been "arrested" alone, and not his passengers, no evidence against him would have resulted. It then speculates that if his passengers had been "arrested" alone, and not him, supposedly "the same incriminating information [which did result] would have been obtained" (Brief for Pet. 14). Adding the apple to the orange, it concludes "[T]hus any invasion of respondent's Fourth Amend-

ment rights is entirely unconnected with the evidence suppressed"(*Id.*). Logically, of course, this hypothetical permits no more than the conclusion that if respondent had *not* been arrested (or otherwise detained) there would have been no invasion of his constitutional rights and if his passengers had *not* been arrested (or otherwise detained) the incriminating information suppressed would not have been obtained. Forgiving the government's "divide and conquer" sophistry, however, we are more concerned with what happens when a motorist and his passengers are arrested (or detained) *together*. That is what happened here; that is what the government apparently does not want to talk about.

What interests of respondent were infringed by the Villa Park procedure? We have already mentioned his right to travel[22] free of unreasonable interference and detention, which ought to be sufficient. But other factors should not be overlooked. Foremost in this case is the simple truth that persons travelling jointly in the same auto have interdependent rights; if you stop the car you stop all the occupants; if you detain the car you detain all the occupants. Nor does exercising the right of persons to associate or assemble together in travel carry with it the waiver of individual rights of freedom from unlawful interference by outside author-

[22]In addition to the Fourth Amendment cases previously cited, see *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) and *Edwards v. California*, 314 U.S. 160, 177, 181 (1941) (concurring opinions) which underscore the importance of unfettered freedom to travel within the Union.

ity.[23] *Cf. Hague v. CIO*, 307 U.S. 496 (1939). This peculiar feature of auto travel creates a special limited interest in each occupant as to the sanctity, if you will, of the car which houses him during his travel. Merely recognizing the interlocked rights of the travelers of course in no way undermines the distinction between structures and vehicles, based on the mobility of the latter, respecting the necessity for a warrant. See *Carroll v. United States*, 267 U.S. 132, 153-156 (1925). But not to recognize that joint traveler's reasonable expectation of a sphere of protection is to say that the individual ". . .right of the people to be secure in their persons, houses, papers, and effects. . ." disappears altogether when a person is in the company of others. *But cf. Recznik v. City of Lorain*, 393 U.S. 166 (1968)(per curiam).

Nor should it be forgotten that respondent was the owner and operator of the automobile, a private passenger car, as well as a mere occupant present in it. As such he would have a further interest in the general liberty, as it were, of the vehicle, whether the source of this interest is found in ownership concepts, *cf., Alderman v. United States*, 394 U.S. 165, 176-80 (1969) (homeowner held to have standing to exclude overheard conversations of third parties on his premises —even if not present himself), or in a proper "reasonable

[23]To say that when there is cause to hold none of the occupants in a detained car then all are aggrieved would of course not require the Court to declare that when there is cause to hold one the attending inconvenience to the others is unreasonable.

expectation of freedom from governmental intrusion." *Cf. Mancusi v. DeForte*, 392 U.S. 364, 367-68 & n.4 (1968) (person sharing space in an office has standing to exclude third party papers seized from the premises). We understand that *Alderman* and *DeForte* dealt with the problems of homes and offices, not autos, and that even then there were dissents in each. Yet, they are the law of the land and, moreover, the right of persons to travel freely in this Country without the harassment of stops for general exploratory investigations and police state demands for "satisfactory proof of identity" is surely worthy of similar protection. We submit that the Constitution requires, and a motorist may reasonably expect, a modicum of inviolability of his car during his travels—a measure of protection sufficient at least to shield off the Villa Park dragnet.[24]

Finally, respondent certainly had an interest and right not be be "seized" and "detained" as a translator whether the subsequent use to which he was put is deemed part of a "search" or not. *See Davis v. Mississippi*, 394, U.S. 721 (1969); *United States v. Dionisio*, 410 U.S. 1, 8-9 (1973). In the instant case the owner and driver of the car was detained and pressed into service by the police as a translator on the scene at the intersection of North and Addison. This was ". . .the 'seizure' of the 'person' necessary to bring him into contact with government agents. . ." *United States v. Dionisio*, 410 U.S. at 8. The law enforcement

[24]The rights attending travel in a private motor vehicle are not necessarily the same as those attending travel in a more public conveyance. The rights of passengers in common carriers need not be decided in this case.

purpose was to carry out the Villa Park standard operating procedure and obtain satisfactory proof of identity from all (although a more innocuous purpose, such as the subsequent procurement of fingerprints, would still invoke the exclusionary rule). *Davis v. Mississippi, supra; see United States v. Dionisio*, 410 U.S. at 11. The quest here entailed a "search" for documents and for identity information not apparent by just looking at the faces of the passengers.[25] The probe revealed information as to the passengers' probable alienage and as to the lack of satisfactory identification by at least two of the passengers.[26] And,

[25]The government neither produced the passengers at the hearing nor elicited any testimony as to their physical appearance. Assuming, however, the passengers exhibited characteristics consistent with Mexican ancestry and Tenuto were able to recognize such (A. 55), they would not become suspicious characters as a result of their skin color. *See United States v. Brignoni-Ponce*, 499 F.2d 1109, 1112 (9th Cir. 1974) (*en banc*), *cert. granted*, October 15, 1974 (No. 74-114); *United States v. Olivares*, 496 F2d 657 (5th Cir. 1974).

[26]The petitioner's claim that "no incriminating information can be traced to the few questions asked while the passengers were inside the vehicle" (Brief for Pet. 13) naturally is addressed to the "search" and not the antecedent detention of the car. Since it remains true that had respondent been permitted to travel on after the return of his driver's license no incriminating information would have been obtained at all, we see little necessity for tracing things back only to the "search". Nonetheless, we should point out that the government's entire case traces back directly to the *answers* "to the few questions", which caused the trip to the police station. Furthermore, the responses, if studied by one trained and competent in immigration law, reveal a great deal about the probable identity of the passengers and their status in the United States, matters which are essential elements of the crime now charged.

as a consequence of the two not having ID's respondent was further exploited to order them out of the back seat of his car and into a police car as well as to convey the front seat passenger to headquarters. At the police station the investigation continued. Petitioner has admitted that the police supervisor had the passengers write out their names before he phoned I&NS in Chicago to conduct a name check (Brief for Pet. 8). It omitted to mention that it was through respondent being used again as a translator that the names (and ages) were obtained (A. 30, 26).[27]

In sum, a number of interests coalesce in this case to give respondent Fourth Amendment standing to complain of what befell him in Villa Park on November 17, 1971, by whatever labels the police intrusion may be described.

In the Court of Appeals the government conceded that the questioning of the passengers in respondent's automobile was a search to which respondent has standing to object. As previously noted, while the petitioner agrees that it made this concession it seeks to escape the effect by now stating that the passengers were in plain view and that the police did not enter respondent's automobile. (Brief for Pet. 13). This

[27]In its statement of facts petitioner singled out testimony of Officer Tenuto expressing his stated belief that respondent was "free to go" once at the police station because he had not been ordered there in the first place (A. 53) (Brief for Pet. 6-7). Suffice to say, no one ever told respondent of this claimed freedom (A. 53), the contempraneous search of his car belies it (A. 53, 62) the Courts below found on ample evidence that respondent in fact was under arrest, and the government has conceded that point here. *See* note 10 *supra* and accompanying text.

statement reflects antiquated property law notions of the Fourth Amendment. The concession below is in accord with the modern law of search and seizure.

This Court in *Katz v. United States*, 389 U.S. 347 (1967), rejected the property law notion of a technical trespass as the sole standard for determining whether a search has occurred. *Katz* held that the Fourth Amendment governs the seizure of oral statements without a technical trespass whenever the government violates an individual's reasonable expectation of privacy. Indeed, the Court specifically held there that the absence of any physical intrusion was irrelevant. It is difficult to conceive how petitioner can maintain, in light of *Katz*, that a technical trespass is required before the Fourth Amendment protections come into play. The officers here detained the car and probed its occupants orally for documents and information not apparent to the eye. Can the police similarly probe a home by beaming their commands in with a bull-horn and claim no search has occurred?

Significantly, in *Katz* the government argued that since the defendant could be seen when he entered the telephone booth his right to privacy had not been invaded. This Court rejected that argument emphasizing that what Katz "sought to exclude was not the intruding eye—it was the uninvited ear. . ." (389 U.S. at 552):

> "The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was

> not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." (footnote omitted)

Parenthetically, we should add that it is also of no consequence that the information seized was intangible and not subject to ownership. It is well settled that oral statement obtained as a result of the invasion of an individual's Fourth Amendment rights are subject to suppression, along with evidence obtained as a result of that unlawfully obtained evidence. *E.g., Wong Sun v. United States*, 371 U.S. 471 (1963); *Katz v. United States*, 389 U.S. 347 (1967); *Alderman v. United States*, 394 U.S. 165 (1969).

When the petitioner states that the passengers were "in plain view" it is using tag words again without giving them their proper meaning. Of course the passengers were in plain view—the police might have been justified in the actions had respondent attempted concealment. The evidence against respondent is the identity of the passengers as aliens unlawfully within the United States who made a previous entry into the United States within the three prior years, respondent's knowledge of that and respondent's transportation of these individuals. Proof of this was no more in plain view than evidence of a crime inside an innocent brown paper bag, *see United States v. Shye*, 473 F.2d 1061, 1066 (6th Cir. 1973) (stolen money concealed in a visible brown paper bag held not to be within the plain

view exception to the warrant requirements), or inside an auto's trunk (Brief for Pet. 15). Although tire treads and paint on the exterior of an auto may be in "plain view" *Cardwell v. Lewis*, ____ U.S. ____, 94 S.Ct. 2464, 2469-70 (1974) there would have been no point in interrogating the occupants if the evidence of their status was similarly exposed. And, as was stated in the opinion of the Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971) speaking of planned searches (like the administrative type search in the instant case):

> "...the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

The petitioner cannot avail itself of antiquated property law notions or phrases such as "plain view" which have no application to this case, and which only serve to obscure the real issues. The respondent's constitutionally protected interests were violated by his detention and the detention of his car for purposes of carrying out the standard operating procedure in Villa Park. The invasion of respondent's own rights was an integral and essential part of this unlawful police practice.[28]

[28]We have already expressed our view that the government's present distinction between a "search" and an "arrest" is a semantic ploy, a distinction without a difference under the facts of the instant case. See note 21 *supra* and accompanying text. We should add that petitioner was well aware of these concepts below and its concession of standing was made in the context of an argument that the police conduct amounted to either a "search" *or* an "investigatory stop" (A. 77). Hence, its current theory that the Court of Appeals overstepped that concession (Brief for Pet. 13, 14-15) must, respectfully, be regarded as just one more attempt by petitioner to bend the record herein.

C. The Necessity to Deter Such "Dragnet" Routines as Found in this Case Is Great Lest the Police Be Licensed to Declare a Field Day against Motorists Carrying Passengers.

Finally, we must address the probable ramifications of the Court's depriving respondent of standing to complain of the Villa Park standard operating procedure and reversing the decisions below. The police practice in question is a predictable integrated procedure "bound together by one sole purpose", *United States v. Jeffers*, 342 U.S. 48, 52 (1951), a procedure in which "wholesale intrusion upon the personal security of our citizenry" *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) are nearly inevitable. Any motorist traveling at night in Villa Park is subject to the intrusion and, if he or any of his passengers are so luckless as not to have "satisfactory identification", will find himself at police headquarters (Pet. App. 20a-21a). We cannot believe *Terry v. Ohio*, 392 U.S. 1 (1968) or *Adams v. Williams*, 407 U.S. 143 (1972) were ever meant to open such sluicegates. As the Ninth Circuit most recently stated in an alien transporting prosecution "[s]uch stops are entirely inconsistent with the Supreme Court's opinion in Almeida-Sanchez". *United States v. Brignoni-Ponce*, 499 F.2d 1109, 1111 (9th Cir. 1974) (*en banc*), *cert. granted*, October 15, 1974 (No. 74-114). As the Ninth Circuit stressed, this Court ended its opinion in *Almeida-Sanchez v. United States*, 413 U.S. 266, 474-75 (1973) by quoting the following pertinent language from *Carroll v. United States*, 267 U.S. 132, 153-54 (1925):

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The Ninth Circuit, sitting *en banc*, concluded that immigration agents are not cloaked with authority to stop cars anywhere in the Country on mere suspicion in order to interrogate the occupants as to their right to remain in the United States. *United States v. Brignoni-Ponce*, 499 F.2d 1109, 1111 (9th Cir. 1974) (*en banc*). We conclude *a fortiori* that Villa Park police officers are not entitled to stop or hold cars without any suspicion at all in order to interrogate the occupants as to their identity.

The *amici curiae* are understandably concerned with the discriminatory potential of the Villa Park procedure (Brief of *Amici Curiae* 35-39). Surely the enforcement of the immigration laws would be revolutionized by a reversal in this case. And, we are sympathetic to the feelings of second class citizenship engendered by vulnerability to unfettered police harassment, whether the police action is well-intended or not. But, we are

equally apprehensive of the potential loss of liberty for Everyman. If the police can stop and detain automobiles at will, investigate the passengers to their hearts' content, and freely convict the driver of crimes on the basis of what they have learned from the passengers, they will do so. The temptation has always proven too great. *See Mapp v. Ohio*, 367 U.S. 643 (1961). But, as this Court stated in *Almeida-Sanchez*, ". . .the *Carroll* doctrine does not declare a field day for the police in searching automobiles". 413 U.S. at 769.

Nor is the threat confined to motorists. The government's theory artificially nullifying standing when a defendant's rights are invaded in conjunction with the rights of others in his group is not so limited. Rather, a new concept is unleashed, albeit in the guise of ". . .traditional rules of standing" (Brief for Pet. 15). We can imagine the government in some future case arguing, for example, that a homeowner defendant does not have standing to object when no evidence directly from his own lips is offered against him even though the police have made the entire case against him by the routine of stationing themselves visibly at the door of his house, preventing everyone from leaving, using him as a translator to interrogate his guests (or co-tenants, or family members) through the windows, ordering him and the other occupants to the police station, and there using him as a translator again to continue a general exploratory investigation. Upon reversal herein other examples undoubtedly would spring forth to confound the law and further water down the protection of the Fourth Amendment. Where the government's theory would ultimately lead is hard to foresee, but this much is clear: a reversal here would immediately deliver all

motorists with passengers to a police state like that oppressing minorities and dissidents in certain well-known totalitarian countries. This case calls for a firm rejection of that prospect.

D. The District Court Ruling Should Be Affirmed Since Respondent Has Standing to Exclude the Evidence and That is the Only Question Before This Court.

The central question in this case, as it is presented to this Court, is whether the courts below "[departed] from the established principles" of the law of standing (Pet. 11; Brief for Pet. 14). The petitioner seems to agree, but nevertheless lists, in Part 3 of its argument, a number of problems it would like to raise in other cases. Respondent cannot understand the reason for this list, except as a rhetorical device, but must clear the record. Those issues are not asserted because they cannot be asserted. The petitioner failed to make these arguments in the lower courts, or conceded them, and did not seek to have them reviewed by this Court. The posture of this case can perhaps be better understood in our summing up of some rather basic matters.

A person has standing to assert a claim of Fourth Amendment violation if a legal duty owed personally to him was breached by law enforcement officers. Thus, all agree, he is "aggrieved" by the interference with his freedom, not just by the offer of probative evidence against him irrespective of the source from which it was obtained. If the prosecution obtains the evidence as a consequence of the violation of his personal rights, however, he has standing.

But, all agree, even though a victim of governmental wrongdoing may have standing, not every resulting strand of evidence however remote from the illegal conduct is excluded. Rather an attenuation test is applied, the "fruit of the poisonous tree" doctrine. This is a separate concept.

The petitioner's argument (perhaps not without purpose) continually but subtly tends to confuse and blend standing–the question, as we indicated, of whether the defendant's own Fourth Amendment rights were abused, *Alderman v. United States*, 394 U.S. 165, 171-76 (1969)–with taint–the question of "whether, granting establishment of the primary illegality, the evidence to which. . .objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Alderman v. United States, supra*, at 180-81. The attempted amalgamation of concepts manifests itself most often in the persistent linking in the same sentence of the words "standing" and "future testimony of witnesses", as for instance in the government's formulation of the Question Presented (Brief for Pet. 2). Apparently, if we may be blunt, the government would invite the risk of doctrinal distortion and confusion in order to escape its concessions in the Court of Appeals. Alternatively, it is just sloppy in its analysis. The fact remains that the government did concede standing below–and quite properly so. Respondent's own personal freedom was abused when the Villa Park police interrupted his travel and detained him to carry out their quest for proof of identity of all occupants of the car. Thus no real question of standing

faces this Court, although at least it has been raised and argued by the parties. The more pertinent question *may* be when, or whether, the testimony of witnesses discovered as a result of police illegality amounts to "fruit of the poisonous tree" to be exluded from evidence. But petitioner made no factual record on this issue in the trial court to overcome the appearance of direct taint and conceded it as a legal issue in the appellate court (*see* note 11 *supra* and accompanying text), so that question is not before this Court. In the words of petitioner itself, "this case does not present a suitable vehicle for the issue" (Pet 11-12, n.4).[29] Therefore, if this Court does not deem "clearly erroneous" the District Court's factfinding that respondent's own rights were violated when after the police had cleared his driver's license they nonetheless detained him in order to carry out an investigation of his passengers, *see Davis v. Mississippi*, 394 U.S. 721 (1969), then the only remaining chore for the Court, it seems, is to affirm the opinion of the District Court. *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam). *Cf. Rios v. United States*, 364 U.S. 253 (1960). Such an affirmance in no way constitutes a "gross departure from established principles of stand-

[29]Proof that the petitioner is indeed sincere in its disclaimer that it is actually advancing the tainted witness issue which it now mentions without arguing may be inferred from the fact that it has never served on respondent the Brief for the United States in *Michigan v. Tucker* which it has cited, hypothetically, to the Court (Brief for Pet. 16). See also petitioner's Summary of Argument. (Brief for Pet. 12). We must take petitioner's failure to argue the "fruit of the poisonous tree question" as concession for purposes of this case.

ing" (Brief for Pet. 14; Pet. 11) and to the contrary avoids injecting "serious confusion" into the law of standing such as—but likely more insidious than—that petitioner says it discerns in the opinion of the Court of Appeals[30] (Pet. 11).

In final analysis of what is actually before the Court, the case is reduced to the following:

Respondent is sitting in a parked car in Villa Park at night, looking at a map. He is observed by police officers who approach him, offer to assist, and demand identification from him. The police observe three locked briefcases on the seats of the car. These briefcases do not belong to the respondent. In accordance with their standard procedure of demanding to know the contents of all briefcases and seizing those they cannot open, the police take two of those briefcases to the police station in their own patrol car, and order respondent to drive to the police station with the third. He does so.

When they arrive respondent and all three briefcases are taken inside, and respondent is directed to open the combination locks of the briefcases. Inside the police discover maps with writing in a foreign language. The police call an individual who translates the writing, and by using the maps discovers evidence that respondent has committed a crime. They propose to offer the maps and the evidence they have obtained at respondent's trial.

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[30]As to the government's prediction of chaos and confusion stemming from the opinion of the Court of Appeals (Pet. 11), we note that at the time of this writing the Shepard's Citation Service computer reports only one case (*United States v. Brignoni-Ponce*, 499 F.2d 1109, 1112 (9th Cir. 1974) (*en banc*) *cert. granted*, October 15, 1974 (No. 74-114) even citing the July 18, 1973 opinion of the Seventh Circuit.

Granting the existence of the exclusionary rule as a sanction for violation of the Fourth Amendment, could respondent's standing to suppress the maps and derivative evidence be questioned seriously? We doubt that it could. Substitute passengers for the briefcases and we have the present case.

The petitioner's problem is that the evidence here is human and testimonial, and not physical. But that issue was conceded by the petitioner in the Court of Appeals, and is not before this Court. Respondent has standing and therefore the judgment below should be affirmed.

CONCLUSION

For all the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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